

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION**

BELFER COSMETICS, LLC,)	
)	
<i>Plaintiff,</i>)	Civ. Case No. 15-CV-683
)	
-v-)	
)	
NORDSTROM, INC. and)	Hon. Lee H. Rosenthal
ERNO LASZLO, INC.,)	
)	
<i>Defendants.</i>)	
)	

**DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO SEVER AND TRANSFER THE ACTION AGAINST ERNO LASZLO,
INC. AND STAY THE ACTION AGAINST NORDSTROM, INC.**

Respectfully submitted,

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INTRODUCTION

Defendants respectfully submit this Reply in Support of their Motion to Sever and Transfer the Claims Against Erno Laszlo, Inc. ("EL"), and Stay the Claims against Nordstrom, Inc. ("Nordstrom") (Dkt. 46).

ARGUMENT

I. SEVERANCE OF THE CLAIMS AGAINST EL IS PROPER AND APPROPRIATE.

EL has requested that this Court sever the claims against it as a predicate to transferring venue of the severed action to the Southern District of New York. It is common practice for a District Court to authorize the transfer of "any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). *See also, In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1364 (Fed. Cir. 2014) (vacating lower court decision that denied motion to sever, stay and transfer).

In its opposition, the Plaintiff points to its satisfaction of the requirements for joinder under 35 U.S.C. § 299 as a basis for opposing severance. But the mere fact that Plaintiff has alleged facts sufficient to satisfy the standard for joinder does not divest this Court of the discretion and authority "to refuse joinder in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010)..

Plaintiff contends, for purposes of the Court's evaluation of whether severance is appropriate here, that the claims against Nordstrom are not peripheral to the claims against EL. Plaintiff relies simply on the fact that 35 U.S.C. § 271(a) is applicable against any party who sells or offers to sell an allegedly infringing product. But in cases where the manufacturer of a product and the retailer of the same product are accused of infringement, district courts,

1 including those in the Fifth Circuit, have routinely treated the manufacturer as the "true
2 defendant" in the dispute, with the claims against a retailer characterized as merely peripheral. *In*
3 *re Nintendo of Am., Inc.* 756 F.3d at 1365 (Fed Cir. 2014)(court acknowledged that while some
4 of the Retail Defendants' stores were located in the original venue, none "had any information
5 relating to the development or design of the accused [products]."); *LG Elecs. Inc. v. Advance*
6 *Creative Computer Corp.*, 131 F. Supp. 2d 804, 811 (E.D. Va. 2001)(holding that claims against
7 a reseller were peripheral because the reseller was not the manufacturer of the infringing product
8 and would be liable only if the manufacturer infringed the patent); *MGT Gaming, Inc. v. WMS*
9 *Gaming, Inc.*, 978 F. Supp. 2d 647, 664 (S.D. Miss. 2013)(Patent infringement claims against a
10 retailer, distributor, or customer of infringing products deemed peripheral to a claim against a
11 manufacturer);

12
13 Plaintiff also asserts that damages from Nordstrom do not constitute double recovery, as
14 it is entitled to base its damage calculations on Nordstrom's higher sales prices. The *In re*
15 *Nintendo* court, *supra*, rejected the same argument, concluding the court concluded that such an
16 argument did not prohibit transfer because the patent owner would have no claim against the
17 retailer defendants unless liability was first established with respect to the manufacturing
18 defendant, thus such an argument was inappropriate on a motion for severance. *In re Nintendo*,
19 756 F.3d at 1366. Here, EL has raised certain defenses, including non-infringement, which,
20 unless resolved in the Plaintiff's favor, would necessarily lead to the dissolution of any claims
21 against Nordstrom.

22 Therefore, severance in this matter is warranted as: (1) the remaining claims against
23 Nordstrom, an innocent non-manufacturing retailer, are peripheral to the infringement claims
24 against EL; (2) a finding of non-infringement for EL would adjudicate and dispose of the
25

remaining claims against Nordstrom; and (3) for reasons otherwise warranting transfer of the severed claims against EL under § 1404(a), as described below. *Koh v. Microtek Int'l, Inc.* 250 F. Supp. 2d 627, 632 (E.D.Va. 2003)(citing three-factor standard for severance).

II. THE TRANSFER OF THE SEVERED CASE AGAINST EL WOULD BE PROPER AND APPROPRIATE AS THE SOUTHERN DISTRICT OF NEW YORK IS A MORE CONVENIENT FORUM.

Under 28 U.S.C. § 1404(a), if the transferee venue is determined to be proper, the Court must proceed to analyze several private and public interest factors when analyzing for a transfer of venue. *See, ATEN Int'l Co. v. Emine Tech. Co.*, 261 F.R.D. 112, 123 (E.D. Tex. 2009). Should analysis of these factors result in the determination that another venue is “clearly more convenient,” the case should be transferred. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008).

It is undisputed that the claims against EL could have been brought in New York, as New York is the state in which EL maintains its principal place of business. Because of this and “in the interest of justice,” it is appropriate for the court to exercise its discretion in transferring venue to the Southern District of New York based on the weighing of the convenience factors. *Koh*, 250 F. Supp. 2d 627, citing *Southern Ry. Co. v. Madden*, 235 F.2d 198, 201 (4th Cir. 1956). *See also, Shifferaw v. Emson USA*, No. 2:09-CV-54-TJW-CE, 2010 WL 1064380, at *4 (E.D. Tex. Mar. 18, 2010).

A. Private Interest Factors

1. Relative Ease of Sources

In patent infringement cases, Courts have held that “the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location.” *In re Genentech, Inc.*, 566 F.3d

1 1338, 1345 (Fed. Cir. 2009). Upon a defendant's showing that a different venue is a more
2 convenient forum, the district court cannot give too much deference to a plaintiff's choice of
3 venue. *In re Nintendo Co., Ltd.*, 589 F.3d 1194, 1200 (Fed. Cir. 2009)

4 While much of the document discovery in this case may ultimately be exchanged in
5 electronic form, many of the documents relating to the products at issue are no longer available
6 to EL because the products were commissioned for formulation and manufactured over a decade
7 ago. *See*, Nohavicka Declaration at ¶ 8-9. As a result, EL anticipates that deposition testimony
8 will comprise much of the discovery in this case, including from testimony of EL employees
9 with personal knowledge of the instant matter, such as Patricia Schuffenhauer. Moreover,
10 additional discovery may occur in the form of inspection of EL's facility or computers, or
11 additional searches for hard copies of sales records will also take place in New York. The Court
12 should accord weight to these items as access to *any* source of proof is still relevant and cannot
13 be ignored in performing a §1404(a) analysis. *In re Volkswagen*, 545 F.3d at 316. As no
14 relevant evidence regarding the accused products will be derived from the Southern District of
15 Texas. For these reasons. Thus, this factor weighs in EL's favor of transfer.

17 2. Availability of Compulsory Process and Convenience of Witnesses

18 Plaintiff focuses its argument on whether EL's named witnesses are "compulsory."
19 However, for the convenience of witnesses, courts consider all potential material and relevant
20 witnesses, despite their importance to any party's case, and whether the witnesses reside or work
21 within 100 miles of the court. *In re Nintendo of Am., Inc.*, 756 F.3d 1363 (Fed. Cir. 2014). Any
22 witnesses, whether presently named as witnesses or later produced on behalf of EL will more
23 than likely originate from the pool of witnesses comprised of EL employees located within EL's
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25

1 principal place of business in New York. Thus, the factor for the convenience of witnesses,
2 whether compulsory or not, weighs in favor of transfer.

3 3. The Cost of Attendance for Willing Witnesses

4 Any witnesses pertinent to the Defendants' defenses, or to the circumstances surrounding
5 the filing of the patents at issue, likely reside in the state of New York. None reside in Texas.
6 Since the "cost of attendance for willing witnesses" factor has arguably been the most important
7 factor (*see, In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009)), and due to the long-
8 standing Fifth Circuit principle that more weight should be given to the convenience of non-party
9 witnesses (*see, BNSF Ry. Co. v. OOCL (USA), Inc.*, 667 F.Supp.2d 703, 711 (N.D.Tex.2009)),
10 this factor would therefore strongly favor transfer to New York.

11 In opposition, Plaintiff, for the first time in this case, identifies two non-party witnesses
12 as necessary for Plaintiff's case. *See*, Plaintiff's Opposition Brief at pp. 6. The Plaintiff did not
13 identify these individuals in its Initial Disclosures, but now identifies them to support its
14 opposition to EL's motion. *See*, **EXHIBIT C**. However, the non-party witnesses in question
15 have no relationship to the allegations against the defendants in this case; they were merely
16 involved in a completely prior and distinct infringement action relating to the same patents. *Id.* at
17 pp. 6 & 16. These witnesses can offer no personal knowledge of the accused products belonging
18 to EL or any knowledge in relation to Nordstrom, nor can they attest to the particular
19 circumstances of the instance litigation in the same manner as the witnesses offered by EL.
20 Therefore, Plaintiff's witnesses in no way can be considered "key witnesses," and during a
21 transfer analysis, "[t]he convenience of one key witness may outweigh the convenience of
22 numerous less important witnesses." *LeBouef v. Gulf Operators, Inc.*, 20 F.Supp.2d 1057, 1060
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24
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1 (S.D.Tex.1998); *Houston Trial Reports, Inc. v. LRP Publ'ns, Inc.*, 85 F.Supp.2d 663, 668
2 (S.D.Tex.1999).

3 4. All Other Practical Problems That Make a Trial Easy, Expeditious and
4 Inexpensive.

5 In making its claim that there is no “substantial, tangible connection to New York,”
6 because the accused products were not manufactured in New York, Plaintiff repeatedly cites to
7 one interrogatory response wherein EL stated: “No changes were made to the TranspHuse
8 products, as the products were formulated and manufactured by different companies over a
9 decade ago (i.e. Raffaello, Mana and Thibant). Therefore, Defendant Erno Laszlo does not have
10 the capacity, know-how or ability to change, modify or otherwise alter the creation, development
11 or formulation of the TranspHuse Products.” *See*, Exhibit F of Defendants’ Motion at
12 Interrogatory No. 8.

13 Plaintiff has taken EL’s statement out of context, as the question asked of EL pertained to
14 interrogatory asked only when EL discovered the Plaintiff’s patents and “any changes [EL] made
15 to [its] Products” upon discovery of the patents. *Id.* EL responded that it only became aware of
16 the patents upon receiving Plaintiff’s complaint, and that no action was taken in relation to the
17 accused products upon discovery of the patents because Plaintiff was not the formulator, and
18 thus, did not have the ability to change any aspects of the products’ formula.

19
20 EL’s inability to alter the formula, however, has no impact on EL’s connection to New
21 York. EL’s principal place of business is in New York, it commissioned the formulation and
22 manufacture of the products from New York, and any communications maintained with the
23 formulators and manufacturers of the products were made from EL employees in New York.
24 Once manufactured, the products were stored in EL’s warehouse. Moreover, at least one
25 manufacturer of the accused products, Mana, is also located in New York. *See*, **EXHIBIT B** for

1 a print-out from Mana's website indicating that they are headquartered in New York City. The
2 majority of information related to this case is in New York and transfer should be granted.

3 ***B. Public Interest Factors***

4 The parties concede that the public factors relating to the familiarity of the proposed
5 forum with the law governing the matter and any potential conflict of laws problems are two
6 public interest factors that are inapplicable. Defendants address the remaining two public interest
7 factors below.

8 1. The Administrative Difficulties Flowing From Court Congestion.

9 Plaintiff argues that transfer to the Southern District of New York would lead to
10 inordinate administrative difficulties. As proof of its claims, Plaintiff offers a chart, with no
11 explanation of the chart's authorship or statistical authenticity, which purports to show the
12 median length of civil litigations being 29.2 months in the Southern District of New York, as
13 opposed to the 21-month median for the Southern District of Texas. *See*, Exhibit G of Plaintiff's
14 Opposition Brief.

15 These statistics, even if taken at face-value, offer no classification between ordinary civil
16 cases and patent cases. Due to the special rules and procedures inherent in patent cases, courts
17 have held this to be a neutral factor when presented with statistical data that did not provide data
18 for patent cases. *Lear Corp. v. TS Tech USA, Inc.*, No. 2:07-CV-406 slip op. at *5-6 (E.D.Tex.
19 Sept. 10, 2008); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319-20 (Fed. Cir. 2008); *See also*,
20 *Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1003 (E.D. Tex. 2009) (Plaintiff did not point to
21 median time for patent trials). Thus, this factor should be considered neutral in the Court's
22 analysis.
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1 2. The Local Interest in Having Localized Interests Decided at Home.

2 In patent cases where the accused product is sold all over the country, courts have held
3 that no specific venue has a dominant interest in resolving the issue of patent infringement. *See*
4 *In re TS Tech*, 551 F.3d at 1321 (“Here, [the accused products] were sold throughout the United
5 States, and thus the citizens of the Eastern District of Texas have no more or less of a meaningful
6 connection to this case than any other venue”). Thus, in most patent cases, this factor will be
7 neutral and would not weigh against transfer. *Odom*, 596 F. Supp. at 1003.

8 Furthermore, the Fifth Circuit has unequivocally rejected the argument that citizens of the
9 venue chosen by the plaintiff have a “substantial interest” in adjudicating a case locally because
10 some allegedly infringing products found their way into their market. *See, In re Volkswagen*, 545
11 F.3d at 317–18; *TS Tech*, 551 F.3d at 1321. By contrast, where a forum has identifiable
12 connections to the events giving rise to the suit, this factor may support litigating the case in that
13 forum. *In re Volkswagen*, 545 F.3d at 318. EL has substantial connections to the state of New
14 York and the products that are the basis of this suit. It is therefore respectfully submitted that this
15 factor should be weighted in favor of transfer.
16

17 **III. THE COURT SHOULD STAY THE ACTION AGAINST NORDSTROM**
18 **PENDING THE RESOLUTION OF THE SEVERED ACTION AGAINST EL.**

19 As part of its request to sever and transfer the claims against EL, the Defendants
20 respectfully request that the action against Nordstrom be stayed pending the outcome of the
21 severed action on the grounds that, should EL gain a judgment in its favor, the action against
22 Nordstrom would likewise terminate. In opposition to this request, Plaintiff cites to a 1936
23 Supreme Court case in which the court required a showing of extreme hardship and inequity that
24 necessitates a stay of proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 249, 57 S. Ct. 163, 164,
25 81 L. Ed. 153 (1936). But the facts of *Landis* are inapposite, as that case dealt with

1 constitutionality of a statute and the plaintiffs successfully argued that a stay—during which the
2 challenged statute would continue to impact their businesses—was prejudicial. *Id.* The *Landis*
3 Court held that "...there is no power by a stay to compel an unwilling litigant to wait upon the
4 outcome of a controversy to which he is a stranger." *Id.* at 255.

5 The instant case does not give rise to any constitutional questions of law, nor are
6 Defendants requesting that the Plaintiff be compelled to wait upon the outcome of a matter to
7 which it is a stranger. Plaintiff will not be prejudiced in any way by a stay against Nordstrom, as
8 the threshold issue it must prove—liability for patent infringement—rests entirely on its case
9 against EL. Therefore, the *Landis* standard cannot be applicable to the instant case, and
10 Defendants contend that the Fifth Circuit's three-factor test applies here. *Soverain Software LLC*
11 *v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex. Feb. 9, 2005)(" (1) whether a stay will
12 unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a
13 stay will simplify the issues in question and trial of the case; and (3) whether discovery is
14 complete and whether a trial date has been set.").

15
16 In its opposition, Plaintiff alleges that Nordstrom has been uncooperative in discovery by
17 failing to identify witnesses having discoverable information. Plaintiff's Opposition Brief at p. 2-
18 3. Plaintiff states that "Nordstrom affirmatively represented that it has no such employees or
19 witnesses," *id.*, citing Nordstrom's Initial Disclosures as alleged support. At best, Plaintiff's
20 statement is a gross mischaracterization of the content of Nordstrom's Initial Disclosures.
21 Nordstrom did not "affirmatively represent" that it had no witnesses. But as a mere retailer,
22 Nordstrom has no witnesses with knowledge of the formulation of the accused product, which is
23 the central issue related to liability in this case, and the primary individuals with relevant
24 information to Plaintiff's suit were identified. Plaintiff has previously been informed that
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1 Nordstrom did not expect to call witnesses at trial but if any relevant witnesses were identified,
2 Nordstrom would provide them at a reasonable time before trial. *See*, Exhibit G of Defendants'
3 Motion at Interrogatory No. 10.

4 Regardless, and despite Plaintiff's attempt to mischaracterize Nordstrom's participation
5 in the discovery process here, it is ultimately unlikely that, as a retailer joined in this case by
6 Plaintiff to enhance its position on damages, Nordstrom will have much information relevant to
7 Plaintiff's burden of proof. The Court in *In re Nintendo Co., Ltd.*, *supra*, stated:

8 In all likelihood, the retailers will have very little to offer in the
9 way of evidence regarding the substantive aspects of the
10 infringement case. They can add little to nothing regarding how the
11 technology underlying the accused products works. Indeed, we and
12 other courts have all but said as much in the analogous context of
the "customer suit exception," which endorses staying a case
against a customer or retailer in light of the notion that the
manufacturer is the 'true defendant.'

13 *In re Nintendo Co., Ltd.*, 544 Fed.Appx. 934, 941 (Fed. Cir. 2013) (citing *Katz v. Lear*
14 *Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed.Cir.1990); *Codex Corp. v. Milgo Elec. Corp.*, 553
15 F.2d 735, 737–38 (1st Cir.1977)). That same logic applies here. Nordstrom is an innocent retailer.
16 Pursuant to a long-time contractual agreement, Nordstrom agreed to sell various EL products,
17 including the accused products. *See*, Defendant's Answer, **EXHIBIT A** at ¶ 11. As the Plaintiff
18 was previously informed, the original agreement between the parties was executed sufficiently
19 long ago that the actual contract between the parties has proven difficult to find. However, on
20 November 16, 2015, Plaintiff was provided with a link to Nordstrom's Purchase Order Terms
21 and Conditions which apply to its relationship with EL. Nohavicka Declaration at ¶ 11.
22 Nordstrom has already provided Plaintiff with its sales numbers for the accused products, which
23 is virtually the only evidence in its possession that would be relevant to the facts of this case.
24 *See*, Exhibit G of Plaintiff's Motion. In relation to Plaintiff's claims against EL, Nordstrom's
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1 participation in the case and the discovery process is effectively complete, as Nordstrom has no
2 other information relevant to Plaintiff's claims of infringement by EL's product. Any relevant
3 discovery will originate with EL, and as noted above, will be found in New York. If EL is
4 successful in establishing that the products do not infringe or that the patents are invalid, the
5 matter will be at an end. By contrast, if Plaintiff is successful in establishing infringement, the
6 stay against Nordstrom could be lifted to allow for resolution of any outstanding damages
7 inquiry. Therefore, it is respectfully requested that the stay of the action against Nordstrom
8 should be granted.

9
10 **IV. THE TIME IN WHICH DEFENDANTS FILED THEIR MOTION HAS NO**
11 **IMPACT OR BEARING ON THE MERITS OF THE MOTION AND DOES NOT**
12 **WARRANT THE MOTION'S DISMISSAL.**

13 Plaintiff argues that the alleged delay by Defendants in filing the instant motion provides
14 a basis for denying Defendants' requests. Plaintiff cites one case in which a motion to transfer
15 was denied for failure to file the motion "with reasonable promptness." *Peteet v. Dow Chem. Co.*,
16 868 F.2d 1428, 1436 (5th Cir. 1989). In *Peteet*, the movants waited a total of eighteen months
17 before filing their motion. *Id.* ("Dow's motion to transfer venue was not filed until eighteen
18 months after the case was remanded to the Eastern District of Texas."). By contrast, Defendants'
19 motion was delayed only two months over the busy holiday season. Regardless, however, such a
20 minimal delay has no bearing or impact on the merits of Defendants' motion and Plaintiff can
21 show no way in which it was prejudiced.

22 **CONCLUSION**

23 For all the foregoing reasons, Defendants respectfully request that the Court should enter
24 an order severing the claims against EL pursuant to FRCP 21, transferring those claims to the
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1 Southern District of New York pursuant to 28 U.S.C. § 1404, and staying the action against
2 Nordstrom, pursuant to FRCP 26, pending the outcome of the severed action.

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5 Dated: Astoria, New York
February 4, 2016

Respectfully submitted,

6 **PARDALIS & NOHAVICKA, LLP**

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8
9 By:


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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION**

BELFER COSMETICS, LLC,

Plaintiff,

-v-

NORDSTROM, INC. and
ERNO LASZLO, INC.,

Defendants.

Civ. Case No. 15-CV-683

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 4, 2016, the foregoing **DEFENDANTS'**
REPLY IN SUPPORT OF THEIR MOTION TO SEVER AND TRANSFER THE
ACTION AGAINST ERNO LASZLO, INC. AND STAY THE ACTION AGAINST
NORDSTROM, INC. was served by mail in accordance with the Federal Rules of Civil
Procedure and the Local Rules of the Southern District of Texas upon the following
participants:

C. Dale Quisenberry, Esq.
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Dated: Astoria, New York
February 4, 2016

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION**

BELFER COSMETICS, LLC,)	
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<i>Plaintiff,</i>)	Civ. Case No. 15-CV-683
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-v-)	
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NORDSTROM, INC. and)	Hon. Lee H. Rosenthal
ERNO LASZLO, INC.,)	
)	
<i>Defendants.</i>)	

**DECLARATION OF JOSEPH D. NOHAVICKA, ESQ. IN SUPPORT OF
DEFENDANTS' MOTION TO SEVER THE ACTION AGAINST ERNO LASZLO,
INC.; TRANSFER VENUE OF THE SEVERED ACTION; AND STAY THE ACTION
AGAINST NORDSTROM, INC.**

JOSEPH D. NOHAVICKA, ESQ. declares under penalty of perjury, pursuant to 28
U.S.C. § 1746, that the following is true and correct:

1. I am a partner of the law firm PARDALIS & NOHAVICKA, LLP, the attorneys
for the Defendants, Erno Laszlo, Inc. ("EL") and Nordstrom, Inc. ("Nordstrom").

2. I submit this declaration in support of the Defendants' motion to sever the action
against EL and transfer the severed action to the Southern District of New York, while staying
the matter against Nordstrom pending the outcome of the severed action.

3. This declaration is made upon personal knowledge and based upon a review of
the file kept in our office.

4. Annexed hereto as Exhibit A is a true and accurate copy of the Answer with
Counterclaims, with accompanying exhibits, filed by the Defendants in the matter. (Dkt. 17).

5. Annexed hereto as Exhibit B is a true and accurate copy of a print-out from the
website of Mana Products, one of the manufacturers of the products being accused of

1 infringement in this action. This exhibit is being offered for the purpose of showing that Mana
2 is located and headquartered in New York City.

3 6. Annexed hereto as Exhibit C is a true and accurate copy of Plaintiff's FRCP 26(a)
4 Initial Disclosures filed on August 28, 2015. (Dkt. 31).

5 7. EL is also a cosmetic company headquartered in New York, and the owner of
6 cosmetic products that are being accused of infringing the Plaintiff's patents in this action.

7 8. Our clients have informed us that the accused products were being retailed by
8 Nordstrom pursuant to a long-standing business relationship that the Defendants had. According
9 to our clients, their contract is not exclusively limited to the sale of the accused products.

10 9. During the discovery that has taken place thus far in this litigation, EL has
11 consistently told us that they are having difficulty finding much relevant and discoverable
12 information relating to the accused products due to the fact that the products were originally
13 formulated and manufactured over a decade ago, and are currently no longer being
14 manufactured.
15

16 10. The same was reiterated to Plaintiff's counsel, Dale Quisenberry, by myself or
17 other attorneys at my firm.

18 11. Furthermore, as Nordstrom is just the retailer of the accused products and had no
19 involvement in the products' formulation or manufacture, the only discoverable and relevant
20 information that has been available for production at this time were Nordstrom's sales numbers,
21 which were provided to Plaintiff. *See*, Exhibit G of Defendants' Motion.

22 12. As the Defendants were unable to locate their original contract agreement from
23 years ago, on November 16, 2015, Plaintiff was provided with a link to Nordstrom's Purchase
24 Order Terms and Conditions which apply to its relationship with EL.
25

1 13. Pursuant to conversations with our clients, Plaintiff was also informed that no
2 Nordstrom witnesses were expected to be called during this litigation, however, should this
3 change, Nordstrom would inform the Plaintiff at a reasonable time before trial. *Id.*

4 14. In an attempt to facilitate the progress of this litigation, however, myself or other
5 members of my staff made multiple requests for Plaintiff to provide us with dates for the
6 scheduling of depositions of our clients so that Plaintiff's counsel could try to personally obtain
7 any more information directly from them. To date, Plaintiff has not responded to this request.

8 15. In their Answer, Defendants asserted multiple defenses which include prior
9 commercial use, non-infringement and invalidity of the patents. *See*, Exhibit A.

10 16. Due to the fact that any further discovery which may occur in relation to the
11 accused products and/or witnesses from the pool of EL employees would arise from the state of
12 New York, Defendants now seek to sever and transfer the claims against EL to the Southern
13 District of New York, while staying the action against Nordstrom.

14 17. Should EL receive a favorable judgment, the stayed action against Nordstrom
15 would no longer exists.

16 18. I declare under penalty of perjury that the foregoing is true and correct.

17
18 Dated: February 4, 2016
19 New York, New York

20 
JOSEPH D. NOHAVICKA, ESQ.

PARDALIS & NOHAVICKA, LLP

Attorneys for Defendants

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Astoria, NY 11106

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS - HOUSTON DIVISION**

BELFER COSMETICS, LLC,)	Civ. Case No. 15-CV-683
)	
<i>Plaintiff,</i>)	
)	
-v-)	<u>CERTIFICATE OF SERVICE</u>
)	
NORDSTROM, INC. and)	
ERNO LASZLO, INC.,)	
)	
<i>Defendants.</i>)	

I HEREBY CERTIFY that on February 4, 2016, the foregoing **DECLARATION OF JOSEPH D. NOHAVICKA, ESQ. IN SUPPORT OF DEFENDANTS' MOTION TO SEVER THE ACTION AGAINST DEFENDANT ERNO LASZLO, INC., TRANSFER VENUE OF THE SEVERED ACTION, AND SUBJECT THERETO, STAY THE ACTION AGAINST DEFENDANT NORDSTROM, INC.** was served by mail in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of Texas upon the following participants:

C. Dale Quisenberry, Esq.
Polasek, Quisenberry & Errington, LLP
6750 West Loop South, Suite 209
Bellaire, Texas 77401

Dated: Astoria, New York
February 4, 2016

PARDALIS & NOHAVICKA, LLP

By: 

TASO PARDALIS (*admitted pro hac vice*)
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